SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 20 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 355

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, STATE OF MISSISSIPPI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOE T. PATTERSON,
Attorney General of the State of Mississippi,

DUGAS SHANDS,
Assistant Attorney General of the State of Mississippi,

PETER M. STOCKETT, JR.,
Special Assistant Attorney General of the State of Mississippi,

WILL S. WELLS,
Assistant Attorney General of the State of Mississippi,
Jackson, Mississippi,

FRANCIS T. ZACHARY,
M. M. ROBERTS,
Hattiesburg, Mississippi,
Of Counsel for Petitioners.

... Grand Kansas City 6, Mo. HArrison 1-8080

INDEX

I. Citations to Opinions Below 1

II. Jurisdiction 2

III. Questions Presented 2

IV. Constitutional Provisions and Statutes Involved 3

V. Statement of Case 3

VI. Specification of Errors 6

VII. Reasons Relied on for Granting the Writ 7

1. The Appellate Court Had No Order Before It of the District Court Because There Was None, and the Federal Court and the Appellate Court Had No Jurisdiction of Its Own to Protect 7

2. In the Absence of the Official Record Duly Certified by the Clerk of the District Court As Provided by Rule 75(g) of Federal Rules of Civil Procedure, No Facts or Proceedings Were Before the Circuit Court of Appeals for the Fifth Circuit, Even If There Had Been an Order; and There Has Been None 13

3. Even If We Assume That There Was an Order When There Was Not, and Even If We Further Assume That There Was an Official Record, When There Was Not, Still on the Basis of What Was Before Said Circuit Court of Appeals in the Nature of a Record, Such As It Was, It Was Improper and Inappropriate to Issue the Injunction 19

4. There Is No Case or Controversy Within the Meaning of Article III, Section 2, of the Constitution of the United States, Between the United States of America and the State of Mississippi in This Cause 20

Appendix "A", Opinion of the Circuit Court of Appeals .A1
Appendix "B", Text of Constitutional Provisions and Statutes Involved A12
Appendix "C", Sec. 2111. Elections—Fraud in Registration of Voters A16
Appendix "D", Sec. 3213. Person Not to Register Unless He Can Read and Write A16
Appendix "E", Sec. 3218. Penalty for Illegally Procuring Registration A17
Appendix "F", Sec. 3219. False Entry and Alteration of Books Punished A17
Appendix "G", House Bill No. 900 A18

CASES CITED

Arizona v. *California*, 283 U.S. 423, 75 L. Ed. 1154 20
Baltimore Contractors v. *Bodinger*, 348 U.S. 176, 99 L. Ed. 233, 75 S. Ct. 249 9, 10
Coleman v. *Miller*, 307 U.S. 433, 83 L. Ed. 1385 20
Connell v. *Dulien Steel Products*, 240 F.2d 414 (C.C.A., 5th) 10, 11-12
Employers Mutual Liability Insurance Company v. *Blue Line*, 2 F.R.D. 121 8
Ettelson v. *Metro Ins. Co.*, 317 U.S. 188 10, 12
Florida v. *United States*, 285 F.2d 596 (C.C.A., 5th) 10
General Electric Co. v. *Marvel Co.*, 287 U.S. 430 11, 12
Hartford Bank & Trust Company v. *E. F. Drew & Company*, 13 F.R.D. 127 8
In re Chapman Coal Company, 196 F.2d 779 (C.C.A., 7th) 16
Keller v. *Potomac Electric Company*, 261 U.S. 428, 67 L. Ed. 731 20
McGuire v. *Todd*, 198 F.2d 60, 97 L. Ed. 649 (C.C.A., 5th) 7
Muskrat v. *United States*, 219 U.S. 346, 55 L. Ed. 246 20
O'Brien v. *Harrington*, 233 F.2d 17 (C.C.A., Dist. of Col.) 12-13

Piest v. *Tide Water Oil Co.*, 26 F. Supp. 295 8
Shirvin v. *Mesta*, 141 F.2d 668 (C.C.A., 10th) 10
Springer v. *Best*, 264 F.2d 24 (C.C.A., 9th) 18
Tucker v. *National Linen Service Corp.*, 200 F.2d 858 (C.C.A., 5th) 7
United States v. *West Virginia*, 295 U.S. 463, 79 L. Ed. 1546 20
United *States* v. *Wood*, 295 F.2d 772 (C.C.A., 5th) 11
United States Fidelity & Guaranty Co. v. *Anderson Construction Co.*, 260 F.2d 172 (C.C.A., 9th) 17

AUTHORITIES CITED

28 U.S.C.A., Section 1291 8
28 U.S.C.A., Section 1292(a)(1) 8, 11
Federal Rules of Civil Procedure, Rule 75(g) 7, 14, 15, 18
Federal Rules of Civil Procedure, Rule 79(a) 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. _____

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, STATE OF MISSISSIPPI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

I.

CITATIONS TO OPINIONS BELOW.

No decision was entered by the United States District Court for the Southern District of Mississippi, the contentions of Respondent notwithstanding to the contrary. The

opinion of the United States Court of Appeals for the Fifth Circuit is reported in 301 F.2d 818, and is set forth in Appendix "A" hereto.

II.

JURISDICTION.

The opinion and order of the United States Court of Appeals for the Fifth Circuit was entered on April 10 1962 (R. 106). A motion for rehearing filed by Petitioners here was denied by said Court of Appeals on May 21, 1962 (R. 254). The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Section 1254(1).

III.

QUESTIONS PRESENTED.

1. Whether or not the Appellate court had an order of the District Court before it, since there was no order entered, and if there was no order, then the Appellate court had no jurisdiction on attempt at appeal.

2. Whether or not in the absence of an official record, duly certified by the Clerk of the District Court as provided by Rule 75(g) of Federal Rules of Civil Procedure, the Circuit Court of Appeals for the Fifth Circuit had anything before it upon which it could act, even if there had been an order, and there was none.

3. Even if we assume that there was an order when there was not, and even if we further assume that there was an official record when there was not, then the question arises as to whether or not it was, or what it was before the Court on appeal in the nature of a record, such as it was, to entitle the Court to have jurisdiction for issuance or injunction.

4. Whether or not there was or was not a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States, between the United States of America and the State of Mississippi in this cause.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This case involves the following constitutional provisions and statutes of the United States, the full text of which will be set out in Appendix "B" hereto:

1. The Fourteenth Amendment to the Constitution of the United States.
2. 28 U.S.C.A., Section 1291.
3. 28 U.S.C.A., Section 1292(a)(1).
4. Rule 58, Federal Rules of Civil Procedure.
5. Rule 75(g), Federal Rules of Civil Procedure.
6. Rule 79(a), Federal Rules of Civil Procedure.

V.

STATEMENT OF CASE.

The United States of America on July 6, 1961, filed complaint for relief under 42 U.S.C.A., Section 1971, being the 1957-1960 Civil Rights Act, and which complaint was not before the United States Court of Appeals for the Fifth Circuit; and on January 4, 1962, the United States of America filed motion for preliminary injunction seeking to cause uniformity of practices of registration of whites and negroes by the Registrar of Forrest County, Mississippi,

and which motion was not before the United States Court of Appeals for the Fifth Circuit; but there was filed with the said Court of Appeals on March 29, 1962, a "Motion for Injunction Pending Appeal or in the Alternative for a Writ of Injunction" (R. 1-5). In the absence of any record whatsoever, the Assistant Attorney General of the United States and attorneys of the Department of Justice in Washington, D. C., filed with the United States Circuit Court of Appeals for the Fifth Circuit, not a record or anything official from the District Court wherein the case was pending, but a "Memorandum in Support of the Petition for an Injunction" which is in 46 pages (R. 6-51). Chief United States Circuit Judge Elbert P. Tuttle entered order for hearing on April 6, 1962, at the United States Courthouse, Houston, Texas (R. 52), on motion for injunction or in the alternative for a writ of injunction under the All-Writs Statute.

The Court at Houston, Texas, heard argument without an order and without a record and without anything before it excepting what lawyers had to say orally in open court plus that in writing contained in the record in this cause, which resulted in the Court announcing within ten minutes after the argument was concluded that the motion for injunctive relief was sustained and the parties were given oral notice thereof. On April 10, 1962, the Circuit Court of Appeals for the Fifth Circuit entered an opinion and order which is now reported in 301 F.2d 818, with copy thereof as Appendix "A" hereto, and on April 16, 1962, said Court through the Honorable Elbert P. Tuttle, Chief Judge, entered a judgment (R. 52-54). As of April 6, 1962, the Respondents, Petitioners here, had filed a Motion to Dismiss, but the Court never acted thereon (R. 57-58). A brief was furnished in support thereof which the Court probably did not have time to consider in view of the early

announcement of its conclusion after the argument with no opportunity to read and consider that contained in the brief (R. 59-89). Respondents sought on April 6, 1962, to get before the panel of judges sitting for said Fifth Circuit a Memorandum of Facts in Opposition to the Petition for Injunction and the Court had no opportunity to consider this after the argument was had (R. 90-101). There was filed a Motion to Strike on April 6, 1962, which was never heard by the Court and which challenged the jurisdiction of the Court to have made possible the application of said Rule 75(g) of Federal Rules of Civil Procedure (R. 103-104). In the certified copy of the record, in addition to the opinion (R. 106-115) appearing as Appendix "A" hereto, there appears the order signed by Judge Tuttle on April 16, 1962 (R. 116-117).

Respondents felt aggrieved at that done by the United States Circuit Court of Appeals for the Fifth Circuit when there had been no completion of hearing in the United States District Court, and where the attorneys representing the Attorney General of the United States had used up all of the time in the United States District Court for their part of the hearing and knew that the defendants had no opportunity to put on testimony and the Court had no opportunity to enter an order and no order was entered and none of the Rules of Civil Procedure relating to manner of order and provisions for appeal were carried out or entered into in any kind of way, and under these circumstances a Petition for Rehearing with Brief thereon was filed on May 1, 1962 (R. 214-244); and as a part of that furnished to the court there was certificate of the Reporter of the District Court disclosing the facts with reference to the pendency of the cause and that the District Judge had not heard the case in its entirety (R. 246-247). The Petition for Rehearing was denied on May 21, 1962 (R. 254).

VI.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Fifth Circuit erred as follows:

1. In holding that it had jurisdiction of the cause when the United States District Court had not entered an order from which an appeal could be taken as contemplated by Rule 54(a) of Federal Rules of Civil Procedure.

2. In failing to recognize that no judgment or order had been entered and no compliance had been had with Rule 58 of said Rules of Civil Procedure and there had been no compliance with Rule 79(a) of said Rules of Civil Procedure which requires the Clerk of the Court to make a brief notation on the docket showing the substance of each order, and until this notation is had there could be no finality to anything done by said District Court and there could be no appeal.

3. In holding that the Court had jurisdiction over the controversy when there was total failure of plaintiff, Respondent here, to comply with and conform to Rule 75 of Federal Rule of Civil Procedure, and partticularly Rule 75(g) thereof.

4. In holding that there existed before the Court controversy within the meaning of Article III, Section 2, of the Constitution of the United States, between the United States of America and the State of Mississippi in this cause.

VII.

REASONS RELIED ON FOR GRANTING THE WRIT.

The opinion of the Circuit Court of Appeals for the Fifth Circuit failed to recognize many fundamental issues of law; and in the application made of the absent record and of rules controlling same, the Court denied your Petitioners of due process and equal protection of the law guaranteed to them by the Supreme Court of the United States.

There was a total absence of consideration by the Court of Rules 54, 58, 75(g) and 79(a) of Federal Rules of Civil Procedure. If the Circuit Court of Appeals had awaited a time with patience when the District Court could have heard the matter and reached some reasonable opinion based on the facts and law applicable thereto at the time, then a judgment would have been entered and all necessary records would have been made in the trial court and the appeal would have been as contemplated by said Rule 75; but this was not so and there was a hurried hearing not supported by law or reason.

1. The Appellate Court had no order before it of the District Court because there was none, and the Federal Court and the Appellate court had no jurisdiction of its own to protect.

We call to the attention of the Court that contained in brief for respondents, Petitioners here, filed in the Circuit Court of Appeals for the Fifth Circuit when there was hearing at Houston, Texas, on April 6, 1962 (R. 59-89). It should also be mentioned that in the cases of *McGuire v. Todd*, 198 F.2d 60 (C.C.A. 5th), 97 L. Ed. 649 and *Tucker v. National Linen Service Corporation*, 200 F.2d 858 (C.C.A. 5th), that court held that pleadings in civil rights cases

must be stated with particularity in order to grant a motion for production under Rule 34 of Federal Rules of Civil Procedure. Said Court in denying relief relied upon the cases of *Piest* v. *Tide Water Oil Co.*, 26 F. Supp. 295, and *Employers Mutual Liability Insurance Company* v. *Blue Line*, 2 F.R.D. 121, and *Hartford Bank & Trust Company* v. *E. F. Drew & Company*, 13 F.R.D. 127. These cases ought still to be the law and if applied here would require a different conclusion from that reached by said Circuit Court of Appeals for the Fifth Circuit even though there had been a record. We desire to call to the attention of this Court that appeals to the Circuit Court of Appeals are limited to statutory appeals and in this instance are limited to 28 U.S.C.A, Section 1291, or to Section 1292(a)-(1) thereof. We quote from said Section 1291 and Section 1292(a)(1) as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." *28 U.S.C.A., Section 1291.*

> "(a) The Courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court: * * *." *28 U.S.C.A., Section 1292(a)(1).*

This Court has spoken on this through Judge Reed, speaking for five members of this Court, and Judge Burton speaking for himself, and then there was the dissent by Judges Black and Douglas. Stated differently, six of the eight judges participating were behind the opinion from which we here quote as follows:

> "This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. Shanferoke Coal & Supply Corp. v. Weschester Service Corp., 293 U.S. 449, 451, 79 L. Ed. 583, 586, 55 S. Ct. 313. Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. The choices fall in the legislative domain. They are enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or a general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent or approval of the appellate court." *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, 99 L. Ed. 233, 75 S. Ct. 249.

We must recognize that courts do differ about constructions and thus the reason why sometimes the law is not the same all over this country and this may be the reason why this Court sometimes takes jurisdiction because there is different law found in different Circuits under the same subject matter. We are here dealing with 28 U.S.C.A., Section 1292(a)(2). This very section was before the United States Court of Appeals for the Eighth Circuit on December 22, 1960, when a decision was handed down by Judge Ban Woosterhout. In that case there was considerable of discussion, but the part which we desire to call to the attention of the Court, and for the reason that the Court of Appeals for the Fifth Circuit has

indicated that liberal construction ought to be given to the statute so as to get to a desired end, is as follows:

> "Appellants argue that the December 31 order is in practical effect the appointment of a receiver. The answer to this contention is that statutes authorizing interlocutory appeals are to be strictly construed. Changes in appeal jurisdiction should be made by appropriate legislation, not by judicial modification. 'It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system.' Baltimore Contractors v. Bodinger, 348 U.S. 176, 181, 75 S. Ct. 249, 99 L. Ed. 233. The court there held that an order refusing to stay a trial for arbitration proceedings did not constitute a refusal to grant an injunction and hence did not authorize an interlocutory appeal." *Florida* v. *United States*, 285 F.2d 596.

May we suggest that the Eighth Circuit felt obligated to follow this Court in the *Baltimore Contractors* case aforesaid. In the *Florida* v. *United States* case last above cited, in quoting from the case of *Shirvin* v. *Mesta*, 141 F.2d 668 (C.C.A. 10th), a very few words imply what we are trying here to say, and thus, "But on appeal from an appealable order or from the final judgment. * * *" *Shirvin* v. *Mesta*, *supra*. It will be noted that the Tenth Circuit, as did the Eighth Circuit and as did this Court, felt that there must be an appealable order or a final judgment and there was neither here. In the memorandum filed by the Government before the said Circuit Court of Appeals for the argument on April 6, 1962, there were cited cases in support of contention that it was not necessary for an order to be entered by the District Court in order to take an appeal under 28 U.S.C.A., Section 1291 or 1292(a), and these cases are: *Connell* v. *Dulien Steel Products*, 240 F.2d 414 (C.C.A. 5th), *Ettelson* v. *Metro Ins. Co.*, 317 U.S.

188, *General Electric Co.* v. *Marvel Co.*, 287 U.S. 430, and *United States* v. *Wood*, 295 F.2d 772 (C.C.A. 5th). In the *Connell* case, *supra*, decided by the Circuit Court of Appeals for the Fifth Circuit, the District Court granted a temporary restraining order without any time limitation as prescribed by the Federal Rules, and the "restraining order" remained in effect longer than ten days. The question there was whether the "restraining order" became a "temporary injunction" and thus appealable under 28 U.S.C.A., Section 1292(1) at the expiration of the ten day period. The Court there said that it was unnecessary for it to determine whether the order should have been designated as a preliminary injunction rather than a temporary restraining order. Significantly enough, the Court held that the "temporary restraining order" did not become a "temporary injunction" by the expiration of the ten day period and dismissed the appeal. Surely, *Connell* presents a much stronger case for the application of the "practical effect doctrine" urged by the United States than does the case at hand in which the District Judge specifically declined to take any action upon the injunction until the hearing had been completed and all of the evidence heard.

In holding that the appeal was not proper in *Connell*, *supra*, Judge Tuttle, writing for the Court, made the following proper ruling:

> "The practical reasons for not generally allowing appeals from temporary restraining orders are that * * * (3) the trial court should have ample opportunity to have a full presentation of the facts and law before entering an order that is appealable to the appellate courts. * * *
>
> "It is not at all clear that the Court below would actually have granted a preliminary injunc-

> tion, for there are several legal questions that might well have been passed on at such a hearing. Orderly procedure requires that the trial court be given the opportunity of passing on these legal matters at the time of the hearing of the motion for preliminary injunction, * * *" *Connell* v. *Dulien Steel Products*, *supra*.

The rationale of the *Ettleson* case, *supra*, and the *General Electric* case, *supra*, is similar to *Connell*, *supra*. In *Ettleson* this Court held that an order of the District Court setting a hearing on a counterclaim which prayed for an injunction against further prosecution of the complaint prior to trial on the issues formed by the complaint and answer was equivalent to the granting of an injunction against the prosecution of the complaint on theory that a stay by a court of equity of proceedings at law is an injunction, and thus appealable. In the *General Electric* case, *supra*, plaintiffs brought an action against defendant for infringing of patent rights and in their answer defendants set up a counterclaim alleging that plaintiffs were infringing their patent rights and prayed for injunctive relief. The Court entered an order dismissing the counterclaim, and the defendants appealed on the ground that the dismissal constituted a denial of the injunction. This Court held that the order of dismissal of the counterclaim prayed for injunctive relief was a denial of an injunction and thus appealable. None of these cases do violence to the position we take; none of these cases give any comfort, when properly analyzed, to the contention made for the Government of the United States. In every one of these cases there was an order entered by the District Court, and there is no semblance of an order here and there is no semblance of a correlation or any kind of analogous thinking between those cases and the problem we have here and they are simply no authority for what

the Circuit Court of Appeals for the Fifth Circuit has done; but on the contrary, they positively and affirmatively support the position taken for Petitioners in this cause.

Other cases cited by the opposition before the Circuit Court of Appeals in support of that which said Court has done are just as far away from the law necessary to make possible any such holding as said Court has now sought to have done.

An an anti-climax of the presentation here sought to be made and with view of further showing the great divergency of view and surely diversion with that done by the Court about which we are making complaint, the United States Court of Appeals for the District of Columbia said of attempted appeal where there had been no compliance with Federal Rules of Civil Procedure, and particularly Rule 79(a), the following:

> "Rule 79(a) of the Federal Rules of Civil Procedure requires the clerk to enter in the civil docket a brief notation showing the substance of each order and judgment of the court. Rule 58 provides that such notation in the civil docket constitutes the entry of the judgment; and the judgment is not effective before such entry. Until the order or judgment is entered in the civil docket, the case is still in the District Court, there is no finality, and there can be no appeal." *O'Brien v. Harrington*, 233 F.2d 17.

2. In the absence of the official record duly certified by the Clerk of the District Court as provided by Rule 75(g) of Federal Rules of Civil Procedure, no facts or proceedings were before the Circuit Court of Appeals for the Fifth Circuit, even if there had been an order, and there has been none.

Rule 75 of Federal Rules of Civil Procedure deals with the kind of record which must be had on appeal to

a court of appeals and sub-section (g) thereof provides that the record must be prepared by the clerk and necessary parts are identified, and said sub-section (g) of said Rule 75 is as follows:

> "The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusion of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; *the opinion; the judgment or part thereof appealed from*; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The Clerk shall transmit with the record on appeal a copy thereof for use in printing the record, if a copy is required by the rules of the circuit court of appeals." *Rule 75(g), Federal Rules of Civil Procedure.*

Please note from the record and from all therein contained that there is no seal of the Clerk of the District Court, there is no certificate, there is no compliance with any part of sub-section 75(g), and there is no opinion of said District Court because said Court had not gotten through with the case and there is no judgment because there is no judgment which has been entered and there is no part of a judgment, and there is no semblance of any kind of order and said Circuit Court of Appeals did not have before it what Rule 75(g) requires; but it may be in civil rights cases that these Federal Court Rules do not apply and that we ignore them and ignore all the other

great laws of the land dealing with states rights and the stable rights of the majorities and other human rights which have been in existence since the beginning of man and simply be sure that those who have written the civil rights law can do no wrong. In all of the decisions of the courts heretofore there has been a great effort to dignify these Federal Court Rules which were a part of the creative imagination of the Supreme Court of the United States. Courts have generally held that a transcript not certified by the Clerk of the District Court *does not become a part of the record on appeal and will not be considered* and this is particularly so where its accuracy and completeness is attacked; and we have sought to attack the accuracy and the completeness of that which was presented in this cause, and in addition thereto, there is no semblance at trying to in any kind of remote way comply with Rule 75(g) in this cause by the Government of the United States and we do believe that some of the attorneys for the Government of the United States may make errors. We only here seek the assistance of this Court to determine whether there is error which has been made by the Government in trying to get relief from said Circuit Court of Appeals when it was not in the position jurisdiction wise or otherwise to grant any relief or to do anything whatsoever which would be satisfactory to the office of the Attorney General of the United States. On this general subject the Circuit Court of Appeals for the Seventh Circuit, in dealing with Rule 75(g), was much concerned with a transcript of record which was not certified by the clerk and held that same never became a part of the record because there was no compliance with Rule 75(g). There was an additional transcript of the record and the court held that the compilation was not a part of the record. We quote from the opinion as follows:

> "National also moved to strike the additional transcript of record for the reason that the transcript filed was not certified by the Clerk of the District Court. As we have pointed out above, it is true that the additional transcript filed in the office of the Clerk of this Court was not so certified. For that reason the additional transcript never became, and is not now, a part of the record on these appeals. *In re Chapman Coal Co.*, 196 F.2d 779.

There must not only be an order but there must also be a record and that is what we are trying to argue here; and in the same case we have quoted from last above we quote again as follows:

> "Where, as in this case, there has been a hearing in the District Court in which the parties have participated by their attorneys, where evidence has been heard, and where the District Court has entered an order which would be justified by evidence which might have been adduced or agreements which might have been made between the parties in such hearing, the burden is upon the party appealing from such an order to include in the record on appeal a proper transcript of the hearing to show that there was no such evidence or agreement. All possible presumptions are indulged to sustain the action of the trial court. It is, therefore, elementary that an appellant seeking reversal of an order entered by the trial court must furnish to the appellate court a sufficient record to positively show the alleged error." *In re Chapman Coal Co., supra.*

What we are trying to say from the opinion above, and we could quote many of them, is that every appeal contemplates an order and every order carries with it the presumption that it is correct and the only way that said Circuit Court of Appeals could get jurisdiction or assume jurisdiction or attempt to protect its own jurisdiction

is that an order be entered. Until there is an order, said Court must be silent. It must know that it had no jurisdiction and it should not have taken jurisdiction when it had none. Our whole jurisprudence is based on this kind of situation and we appeal to this Court to look at this for the sake of protection of our judicial system in this nation. Somehow we believe that people get excited about the so-called "civil rights" and forget every single solitary thing that has ever existed in this nation under the law. We talk about Law Day and World Court and decisions under the law; and in this nation of ours which is promoting this kind of thing with the President of the United States making a part of the headlines his own pictures for Law Day this year, there is another challenge to us that we in the name of humanity and for the protection of humanities be careful that we not encroach upon the terms and provisions of the Constitution of the United States and that we not encroach upon the simple proceedings and procedural requirements brought to us under the common law and by statutes. Court made law belonging to legislative bodies is a dangerous thing. In this day some of us feel that the judiciary is becoming legislative in many areas of our living and it is hoped that the three departments of government contemplated by the Constitution of the United States will never tend towards destroying us or dragging us into grave misunderstandings between ourselves about what the law is or what it ought to be.

The Circuit Court of Appeals for the Ninth Circuit has held that the record on appeal must show the judgment appealed from. If it does not, the appellate court may direct that the record be supplemented. We refer to the case of *United States Fidelity & Guaranty Co. v. Anderson Construction Co.*, 260 F.2d 172.

In a case arising in the Ninth Circuit with decision dated January 5, 1959, and with the opinion written by Circuit Judge Barnes, it was held that the Federal Rules do not require a transcript or even a part of it to be part of the record on appeal, but it is further held that the Court of Appeals could decide only questions which could be determined from what record there was before it, and all others must be presumed waived. In the particular case to which we refer there was something for the Court to decide but it specifically decided that it could only consider official records, and that is to say records which come by way of the Clerk of the District Court where there is a proper certificate and where there must be knowledge on behalf of the Court of Appeals that it is a genuine official record. Such is not the case here and we quote from the case of the Ninth Circuit in part as follows:

> "The first question presented then is whether, with no record before us, and no question raised on this appeal either as to the legal sufficiency of the complaints in intervention to state a cause of action, or as to the fairness of the instructions given, there is anything before this Court upon which it can rule." *Springer* v. *Best*, 264 F.2d 24.

As said Rule 75(g) of Federal Rules of Civil Procedure affects the rights of the parties and has a controlling force thereto, there likewise are Rules 54(a), 58 and 79(a) and we shall make no further reference thereto but all of same are rules affecting the rights and powers of District Courts and of Courts of Appeal.

3. Even if we assume that there was an order when there was not, and even if we further assume that there was an official record, when there was not, still on the basis of what was before said Circuit Court of Appeals in the nature of a record, such as it was, it was improper and inappropriate to issue the injunction.

We refer generally to the memorandum of facts furnished by the respondents, Petitioners here, before the said Circuit Court of Appeals in hearing of April 6, 1962, in opposition to the petition for injunction. We had sought to call to the attention of said Court previously that Miss Wilma Walley was not called as an adverse witness or hostile witness under provisions of Rule 43(b) of the Federal Rules of Civil Procedure. Since she was not called an as adverse witness and since she was called by the Government of the United States and since her testimony is uncontradicted that although she worked in the office of Mr. Lynd as Deputy Circuit Clerk of Forrest County, Mississippi, her employment in the office had terminated on September 15, 1961 and that she was at that time attending school, this testimony must control and be binding on the Government. Her testimony would require the conclusion that Mr. Lynd did no wrong. Government counsel in argument had persisted in treating Miss Walley as an adverse witness and the trial court admonished Federal counsel to desist from so treating the witness. When counsel for your Petitioners here examined Miss Walley on cross-examination the Government objected to certain questions of counsel, but these objections were overruled. The fact remains that on the proof there is no foundation for issuing a writ of injunction by any court anywhere.

Apparently, we failed to cause the panel of three judges of said Circuit Court of Appeals to understand that

Mr. Lynd as County Registrar had duties and obligations to all prospective voting citizens under penalty of State statutes. He acted under advice of counsel and in spite of this the Government of the United States has filed petition against him in this cause in the nature of contempt proceedings. We plead with this Court, representing all of the citizens of the whole of the United States, to accept jurisdiction and to recognize that there was no showing for injunctive relief, to recognize that the District Court was entitled to hear Mr. Lynd's side of the case; to recognize and consider facts now unknown in the record, but which if same were known, would bring into play certain Mississippi statutes which are constitutional identities and appearing through Sections 2111, 3213, 3218, 3219 and 1962 Amendment to Section 3213 of the Mississippi Code of 1942; and copies of these Mississippi applicable laws, which have had no place in argument with said panel of judges representing the Circuit Court of Appeals for the Fifth Circuit, are attached hereto as Appendix "C", "D", "E", "F" and "G", respectively.

4. There is no case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States, between the United States of America and the State of Mississippi in this cause.

The requirements of a "case or controversy" within the meaning of the judiciary Article of the Constitution of the United States have been clearly and concisely set out in a series and line of cases decided by this Court. See *Muskrat* v. *United States*, 219 U.S. 346, 55 L. Ed. 246; *United States* v. *West Virginia*, 295 U.S. 463, 79 L. Ed. 1946; *Coleman* v. *Miller*, 307 U.S. 433, 83 L. Ed. 1385; *Keller* v. *Potomac Electric Company*, 261 U.S. 428, 67 L. Ed. 731; and *Arizona* v. *California*, 283 U.S. 423, 75 L. Ed. 1154.

It is clear from a reading of the above cited cases and other cases that there is no "case or controversy" in this cause between the United States and the State of Mississippi and it follows that said Circuit Court of Appeals for the Fifth Circuit was without jurisdiction to issue the injunction against the State of Mississippi in this cause and that said injunction should be vacated and resolved.

WHEREFORE, it is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court, and that this petition should be sustained and writ of certiorari issued as contemplated by law.

JOE T. PATTERSON,
Attorney General of the State of Mississippi,

DUGAS SHANDS,
Assistant Attorney General of the State of Mississippi,

PETER M. STOCKETT, JR.,
Special Assistant Attorney General of the State of Mississippi,

WILL S. WELLS,
Assistant Attorney General of the State of Mississippi,
Jackson, Mississippi,

FRANCIS T. ZACHARY,
M. M. ROBERTS,
Hattiesburg, Mississippi,

By
M. M. Roberts,
Of Counsel for Petitioners.

APPENDIX "A".

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19576

UNITED STATES OF AMERICA,
Appellant,

versus

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, STATE OF MISSISSIPPI,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

(April 10, 1962)

Before TUTTLE, Chief Judge, HUTCHESON and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: This is a motion for an injunction pending an appeal which the United States seeks to have this Court issue following a refusal by the District Court for the Southern District of Mississippi to grant a temporary injunction, which the government sought under the provisions of 42 U.S.C.A. 1971(a) (The Civil Rights Act touching on voting), it being charged in the government's complaint that Negro applicants for registra-

tion in Forrest County, Mississippi, were not being treated "without distinction of race [or] color." The government has filed a notice of appeal from the denial of the temporary injunction. Pending the disposition of this appeal on the merits, the government has filed this motion by which this Court is asked to enjoin the alleged violations of the voting rights of the Negro residents of Forrest County in certain particulars as to which the government claims that it offered undisputed proof. Such a motion for an injunction pending an appeal is to be found in the All-Writs Statute, 28 U.S.C.A. 1651, which provides that:

> "The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Rule 62(g) of the Federal Rules of Civil Procedure also provides that the authority granted to the District Court to grant relief pending an appeal does

> "not limit any power of an appellate court or of a judge or justice thereof . . . to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

The basis of the government's appeal and its subsequent motion for injunction pending appeal is its contention that it has been completely frustrated in an effort to obtain an order of the trial court putting an end to alleged racially discriminatory acts and practices which the government contended in its complaint have deprived Negro citizens of Forrest County of their right to register and to vote without distinction of race or color. The government's efforts to redress the wrongs which it alleges exist in Forrest County commenced on August 11, 1960,

ten months prior to the filing of this suit. At that time the United States formally requested that the defendant Lynd, the Registrar of Forrest County, make his registration records available for inspection and copying under Title III of the Civil Rights Act of 1960. These efforts proving fruitless, the government, on January 19, 1961, filed an enforcement proceeding in the District Court to require production of such records. This action also proved fruitless for, although as this Court said in the recent case of *Kennedy, Attorney Genéral, v. Bruce*, 5 Cir., 298 F.2d 860, an order granting the government the right to make such an inspection should have been issued "as a matter of course," the trial court failed for nearly six months to grant such order. Thereupon, on July 6, 1961, this present suit was filed. Thereafter, on February 15, 1962, the court dismissed the enforcement proceeding as "abandoned." This action was taken, so the trial court said, because after the government filed its suit for injunction on July 6, 1961, and moved for discovery of the official registration records of Forrest County under Rule 34 of Federal Rules of Civil Procedure the trial court considered that this effort, which it also blocked, superseded the enforcement proceeding.

In the meantime, the instant litigation was delayed from time to time by dilatory motions, including motions to quash the Rule 34 motion, and including motions to make more definite statement, none of which, of course, should stand in the way of a prompt disposition of a motion for temporary injunction.

Briefly stated, the net effect of the several procedural steps taken by the parties is that the trial court finally set down for hearing the motion for temporary injunction on March 1, 1962, eight months after the suit for injunction was filed, and the posture of the parties was that defend-

ants had objected to, and the trial court had sustained their objections to, giving any access to the records of the Registrar, although at the same time defendants had insisted, and the court had sustained their insistence, on the goverdnment's amending its complaint to allege in great detail the name of each applicant who had sought and been denied the right to register, the date of each such application, the name of each Negro who had been refused the right to register, the dates involving any discriminatory mishandling of any Negro registration applications, the names of white people allowed to register who possessed no better qualifications than such Negroes denied the same privilege, and other facts and circumstances showing such discrimination in each of said instances. Moreover, the court had sustained objections by the defendants to the inclusion among the alleged complaining Negro applicants of any who had been denied the right to register or who claimed a discriminatory practice which had occurred prior to February 26, 1959; the beginning of defendant Lynd's term of office. Out of the 63 Negroes whose names the government had supplied by an amendment to the complaint, the trial court required that all but 40 of these be eliminated because the incidents as to which they were identified occurred prior to this date.

The injunction hearing finally came on for trial on March 5th and continued through March 7th. At this time sixteen of the Negroes whose names had been furnished by an amendment to the complaint testified as to experiences with which they were familiar. The government also undertook to prove discriminatory practices by sixteen white witnesses who had been found to be willing to testify in spite of the refusal of the Registrar, with approval of the Court, to make any records of white voters available to the complainant. During the trial it appeared

that the defendants actually had in court certain voting records of the Negro witnesses, and the court required that these be turned over to the United States. The court also required that the records touching on the registration experiences of the white witnesses be turned over to the United States, but they should not be turned over until after the government completed its case in chief. They were actually turned over as to six white witnesses only after the government closed.

Notwithstanding the well-nigh impossible task of showing the true facts, the witnesses produced by the government proved without question that certain serious discriminations had taken place during the term of office of the defendant Lynd. At the conclusion of the presentation by the government of its evidence, the State and the defendant Lynd both reserved the right of cross-examination and deferred such cross-examination. The defendants then declined to put on any evidence but stated that it would take thirty days to be prepared to file answers to the amended complaint and to prepare for introducing defense witnesses. Thereupon the government moved the Court to issue a temporary injunction. Without doing so, and declining either to grant or refuse a temporary injunction, in terms, the court failed to comply with the motion and granted a recess of thirty days to permit the defendants to file their answer and to prepare for proving their defensive case.

At the time the government made its motion for temporary injunction it is plain that the following facts relevant to the complaint that Negro applicants had been denied equal rights to register and vote in Forrest County had occurred:

(1) No Negro had been registered in Forrest County during defendant Lynd's term of office. There were forty

Negroes who were named in the amended complaint who attempted to register during this period; sixteen of them testified that they attempted to register on one or more occasions since February 26, 1959, one of them four times. None was registered.

(2) No Negro was permitted even to apply for registration prior to January 31, 1961. Those who attempted to do so were told by one of the deputies that they had to see Mr. Lynd personally, and if they saw Mr. Lynd they were told by him that he couldn't register them, but he gave no reason and gave no time when he would undertake to do so.

(3) Prior to January 31, 1961, most, if not all, of the white applicants were permitted to register without filling out an application form. It is undisputed that many persons were registered without these formalities.

(4) From January 31, 1961, to the present, obviously qualified Negroes were rejected for registration unless the Registrar has some basis for denying the right to register which has not been communicated to them. Among these are five school teachers in the public schools of Hattiesburg or Forrest County, Mississippi; six of them hold baccalaureate degrees from colleges, and three of them have degrees of Master of Arts.

(5) In spite of the government's contention that no named white person during the defendant's entire tenure in office had been rejected for registration, none of the defendants nor their deputies were able to testify to any individual white person who had been rejected.

(6) From the date when the defendant started to use the application forms for white applicants, the defendant's deputies received applications from white applicants, but refused to receive them from Negro applicants. It

was conceded that the Registrar himself was engaged in court as the Circuit Court Clerk two and one-half weeks each month, and was thus frequently unavailable.

(7) The defendant Lynd and his deputies assisted white applicants in filling out their application forms, but refused assistance to Negro applicants. Among the few white registered voters who were found to testify for the government, most of them testified either that they had not been required to fill out forms at all, that they filled them out incorrectly and received aid from the defendant, or were otherwise assisted in completing their registration.

(8) The defendant Lynd refused to give reasons to Negro applicants as to the reason or cause for their rejection, and he required that such applicants wait six months before reapplying for registration, although there is no provision in the statute authorizing such conduct.

(9) All of the sixteen N ro witnesses who testified at the trial were required tc ite and interpret different provisions of the Mississippi nstitution from those provisions of the Mississippi constitution that were submitted to white applicants who testified.[1]

---

1. Three of the Negro witnesses testified that they were required to interpret Section 178, the last sentence of which is:

> "In assessing for taxation the property and franchises of corporations having charters for a longer period than ninety-nine years, the increased value of such property and franchises arising from such longer duration of their charters shall be considered and assessed; but any such corporation shall have the right to surrender the excess over ninety-nine year of its charter."

Although we do not here repeat the text of the several sections given to the Negro witnesses and those given to the white witnesses, a reading of them demonstrates beyond any question that by any objective standard those supplied to the Negro applicants were longer, more complicated, and more difficult. Ten white witnesses testified that they were not required to write or interpret any provision of the Mississippi constitution.

We are not now considering the appeal from the refusal of the trial court to grant the temporary injunction on the merits. We are considering only the motion of the government that we grant a temporary injunction pending the hearing of the appeal. We, therefore, do not have for decision the numerous rulings of the trial court, either in relation to the original enforcement suit seeking access to the records or in the present suit for injunction. However, we cannot fail to comment briefly on the course of the litigation because of its direct bearing on the contention of the government that the refusal of the trial court to grant the temporary injunction justifies our granting this relief pending the appeal. We, therefore, point to the fact that this Court has, in the case of *Crum Dinkens* v. *Attorney General of the State of Alabama*, 5 Cir., 285 F.2d 430, and in *Kennedy, Attorney General* v. *Bruce*, *supra*, clearly laid down the rule that the government is entitled to have an order of the trial court authorizing it to inspect the voting records such as are here involved upon the simple assertion by the Attorney General of the United States that there are reasonable grounds for belief that certain voters are being discriminatorily denied their voting rights in a given county. See 42 U.S.C.A. 1971(c). We have thus held that such allegation need not be enlarged or expanded by supplying detailed information such as was required by the Court in the case on appeal. Likewise, it is clear that there was no justification for the Court's requiring the government to amend its complaint in this civil rights action to allege specific details of voter discrimination as if this were an action for fraud or mistake under Rule 9, Federal Rules of Civil Procedure. These matters are commented on not as a final adjudication of the legal points involved, since they have not been briefed and are not now before us on appeal, but because they are relevant

in our considering the need at this time, after nearly nine months following the filing of the suit, to enjoin such discriminatory practices as now appear to be fully proved.

The first objection of the defendants to our granting this relief is that the trial judge did not enter a formal order "refusing" a temporary injunction. He simply failed to do so, although the government made a formal motion during and at the end of its presentation of evidence for the issuance of such an injunction. The movant, under such circumstances, was clearly entitled to have a ruling from the trial judge, and since he did not grant the order his action in declining to do so was in all respects a "refusal," so as to satisfy the requirements of Section 1291. We hold, therefore, that the failure of the trial judge to grant the temporary injunction constituted an "interlocutory order of the district court . . . refusing . . . an injunction." Such order is appealable.

The defendants' next contention is that it would be entirely inappropriate for the court at this time, as they claim it would have been for the trial court at the end of plaintiff's testimony, to grant a temporary injunction, because the State has not filed its answer and has not put on its proof. This contention entirely overlooks the nature of a temporary injunction, which is a writ of the trial court, or, in this instance, of an appellate court, issued to protect the rights of any person moving for it upon his making a showing that he is entitled to it. The grant of a temporary injunction need not await any procedural steps perfecting the pleadings or any other formality attendant upon a full-blown trial of this case. The defendant may, of course, make such counter showing as it deems wise or necessary to meet such proof as is produced by the moving party. Where, however, as is here the case, the plaintiff made a clear showing that rights which it sought to vindi-

cate were being violated, and that no response or counter-proof would be available for some considerable period after these rights should have been, but had not been, taken under consideration by the trial court, the plaintiff has satisfied every requirement for the granting of temporary relief pending a final adjudication of the appeal.

We conclude that the likelihood that the court's refusal to grant the temporary injunction will be reversed as an abuse of discretion is sufficiently great that we are warranted in protecting the rights of the Negro registrants pending a decision on this issue by this Court.

Therefore, pending a final determination of the appeal now pending in this Court, the defendants, their agents, employees, successors, and all persons in concert with them are hereby enjoined from engaging in discriminatory acts and practices based on race in the registration for voting in Forrest County, Mississippi, and they are expressly enjoined from:

(1) Denying Negro applicants the right to make application for registration on the same basis as white applicants;

(2) Failing to process applications for registrations submitted by Negro applicants on the same basis as applications submitted by white applicants;

(3) Failing to register and to issue registration cards to Negro applicants on the same basis as white applicants;

(4) Denying Negro applicants the right to be registered by the same office personnel and with the same expedition and convenience as are being permitted to white applicants, and from failing or refusing to give to Negro applicants the same privileges as to reviewing their application forms at the time they are filled out and advis-

ing Negro applicants of such omissions as appear on their forms as they are now or heretofore have given to white applicants under similar circumstances;

(5) From administering the constitutional interpretation test to Negro applicants by including as sections to be read and interpreted any sections other than those which at the time of the trial had been used for submission to white applicants;

(6) From requiring rejected Negro applicants to wait any different period before reapplying for registration than may be authorized under the laws of Mississippi and other than is required of white applicants.

In view of the immediate pendency of termination of registration proceedings prior to an early election, it is ordered that this injunction shall be effective immediately, and that the judgment and order of this Court be transmitted forthwith to the Clerk of the District Court for the Southern District of Mississippi, and that the Clerk of this Court send a certified copy hereof to each party defendant, said service to be made upon counsel of record.

A true copy

Test: Edward W. Wadsworth
Clerk U. S. Court of Appeals, Fifth Circuit
By s/ Clara R. James
Deputy

New Orleans, Louisiana June 11, 1962.
(Seal)

APPENDIX "B".

Text of Constitutional Provisions and Statutes Involved.

1. The Fourteenth Amendment to the Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation, in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion with the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who,

having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

2. 28 U.S.C.A., Section 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, The District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

3. 28 U.S.C.A., Section 1292(a)(1):

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the District Courts of the United States, the United States District Court

for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

4. Rule 58, Federal Rules of Civil Procedure:

"Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the Civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs."

5. Rule 75(g), Federal Rules of Civil Procedure:

"Record to be Prepared by Clerk—Necessary Parts. The Clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's

report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification."

6. Rule 79(a), Federal Rules of Civil Procedure:

"a. Civil Docket. The clerk shall keep a book known as 'civil docket' of such form and styled as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word 'jury' on the folio assigned to that action."

APPENDIX "C".

§ 2111. Elections—Fraud in Registration of Voters.

If any registrar appointed by law to register votes, shall intentionally refuse or neglect to register any voter entitled to registration, or register any voter not entitled to registration, he shall be punished, on conviction, by imprisonment in the penitentiary not less than one year nor more than three years.

APPENDIX "D".

§ 3213. Person Not to Register Unless He Can Read and Write.

A person shall not be registered unless he is able to read and write any section of the constitution of this state and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government.

The person applying to register shall make a sworn, written, application for registration on a form prescribed by the State board of election commissioners, exhibiting therein the essential facts and qualifications necessary to show that he is entitled to register and vote, said application to be entirely written, dated and signed by the applicant in the presence of the county registrar, without assistance or suggestion from any person or memorandum whatever; provided, however, that if the applicant is unable to write his application by reason of physical disability, the same, upon his oath of such disability, shall

be written at his unassisted dictation by the county registrar.

Provided, however, the provisions herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954.

APPENDIX "E".

§ 3218. Penalty for Illegally Procuring Registration.

Any person who shall knowingly procure his registration as a qualified elector when he is not entitled to be registered, or under a false name, or as a qualified elector in any other election district than that in which he resides, shall, on conviction, be fined not exceeding one hundred dollars or imprisoned in the county jail not exceeding one year, or both. The same penalty shall apply to anyone who is disqualified for any cause and shall reregister before removal of such disqualification to avoid the same, and to all who shall in any way aid in such false registration.

APPENDIX "F".

§ 3219. False Entry and Alteration of Books Punished.

Any false entry on any registration book, or poll book, made knowingly, and any unauthorized erasure or alteration therein, shall be punished as provided for the alteration of any other public record.

APPENDIX "G".

House Bill No. 900.

AN ACT TO AMEND SECTION 1, CHAPTER 104, LAWS OF 1955 EXTRAORDINARY SESSION, DECLARING AND CLARIFYING THE ORIGINAL INTENT THEREOF AND PROVIDING THAT THE REQUIREMENTS THEREOF WERE AND ARE MANDATORY, AND NO APPLICATION SHALL BE APPROVED UNLESS THE REQUIREMENTS THEREOF ARE COMPLIED WITH; AND TO INSERT THE REQUIREMENT OF SECTION 241-A OF THE CONSTITUTION OF MISSISSIPPI THAT NO PERSON SHALL BE REGISTERED UNLESS HE BE OF GOOD MORAL CHARACTER.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 1, chapter 104, laws of 1955 extraordinary session, is amended to read as follows:

Section 1. *Person not to register unless he can read and write.* A person shall not be registered unless he be able to read and write any section of the constitution of this state and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government; he shall also demonstrate to the county registrar that he is a person of good moral character.

The person applying to register shall make a sworn, written application for registration on a form prescribed by the state board of election commissioners, exhibiting therein the essential facts and qualifications necessary to show that he is entitled to register and vote, said applica-

tion to be entirely written, dated and signed by the applicant in the presence of the county registrar, without assistance or suggestion from any person or memorandum whatever; provided, however, that if the applicant is unable to write his application by reason of physical disability, the same, upon his oath of such disability, shall be written at his unassisted dictation by the county registrar. As originally enacted each provision is and it is further declared to be mandatory and not directory; no application should have been and shall not be approved or the applicant declared qualified to register to vote unless all blank spaces in the application and the oath are properly and responsively filled out by the applicant; and the oath, as such, shall be signed by the applicant; and the application, as such, shall be signed separately by the applicant at the places thereon provided for applicant's signature.

Provided, however, the provisions herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954; except that from and after the effective date of this act no person shall be permitted to register unless he demonstrates to the county registrar that he is of good moral character as required by the provisions of Section 241-A of the Constitution of Mississippi.

SECTION 2. Should any provision of this act be held to be unconstitutional or otherwise invalid for any reason such holding shall not be construed to affect the validity of any other part or portion of this act.

SECTION 3. That this act shall take effect and be in force from and after its passage.

LIBRARY

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

American Construction Co. v. Jacksonville Railway, 148 U.S. 372	9
Baltimore Contractors v. Bodinger, 348 U.S. 176	7
Chapman Coal Co., In Re, 196 F. 2d 779	7
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541	6
Denver v. New York Trust Co., 229 U.S. 123	9
Ettelson v. Metropolitan Life Insurance Company, 317 U.S. 188	6
Panama Railroad Co. v. Napier Shipping Co., 166 U.S. 280	9
Springer v. Best, 264 F. 2d 24	7
United States v. Lynd, 301 F. 2d 818	5
United States v. Wood, 295 F. 2d 772, certiorari denied, 369 U.S. 850	6

Statutes and Rules:

28 U.S.C. 1292(a)	6
28 U.S.C. 1292(b)	3
42 U.S.C. 1971	2
42 U.S.C. 1974	3
Rule 9, Federal Rules of Civil Procedure	3
Rule 34, Federal Rules of Civil Procedure	3
Rule 75(j), Federal Rules of Civil Procedure	7

Miscellaneous:

Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, pp. 231–234 (1951 ed.)	9

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 355

THERON C. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, MISSISSIPPI, AND THE STATE OF MISSISSIPPI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 301 F. 2d 818.

JURISDICTION

The order of the court of appeals was entered on April 10, 1962 (R. 106), and rehearing was denied on May 21, 1962 (R. 254). The petition for certiorari was filed on August 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to issue an injunction pending appeal,

2. Whether the injunction pending appeal was properly issued.

STATEMENT

On July 6, 1961, the United States filed an action in the United States District Court for the Southern District of Mississippi under the Civil Rights Acts of 1957 and 1960 (42 U.S.C. 1971), alleging that the defendants (the State of Mississippi and Theron C. Lynd, the present registrar of voters in Forrest County, Mississippi) had engaged in racially discriminatory acts and practices which deprived Negro citizens of Forrest County of their right to register and to vote without distinction of race or color;[1] that such deprivations were and are pursuant to a pattern and practice; and that, unless restrained, the defendants would continue to engage in their racially discriminatory conduct. The prayer was for a preliminary and a permanent injunction.

A number of times prior to and during the hearing of the motion for a preliminary injunction the government requested the production of the Forrest County voting registration records. Such requests were made under Title III of the Civil Rights Act of

[1] It was charged specifically that the defendants apply different and more stringent standards to Negroes than to white persons in determining their qualifications to vote; that they refuse to afford Negroes an opportunity to register equal to that afforded white persons; that they unreasonably delay the receipt of Negro applications; and that they arbitrarily refuse to give Negroes an opportunity to apply for registration.

It was claimed also that a substantial majority of the 22,431 white voting-age residents of Forrest County are registered to vote whereas only about 25 of the 7,496 Negro voting-age residents of the county are registered.

1960 (42 U.S.C. 1974), Rule 34 of the Federal Rules of Civil Procedure, and by subpoena duces tecum. With insignificant exceptions, the court did not grant the government access to these records until after the hearing was concluded and even then only a portion of the records was made available.[2]

After various preliminary hearings the court held that it would not proceed unless the government amended its complaint to comply with Rule 9 of the Federal Rules of Civil Procedure. Rule 9 provides that "in all averments of fraud * * * the circumstances constituting fraud * * * shall be stated with particularity * * *." A request for a certification for an interlocutory appeal from this decision under 28 U.S.C. 1292(b) was denied. Subsequently, the court ordered that the government amend its complaint so as to state specifically:

> (1) The date of each application or attempt to register.
>
> (2) The name of each Negro denied the right to vote.
>
> (3) The name of each Negro refused registration who applied therefor.

---

[2] When counsel for the government was cross-examining Negro witnesses, and it became apparent that petitioner Lynd had with him the application cards of the thirteen Negro witnesses who had been permitted to apply, the court ordered them to be given to plaintiff as each witness was questioned during the hearing. During the hearing the court ordered the defendants to produce application forms of the white witnesses. Six of these were produced and the court permitted their introduction at the close of the testimony. After the hearing, on March 8, 1962, the court ordered production of certain of the other records requested by the government. This order was generally limited to records during Lynd's tenure in office.

(4) The dates involved in any discriminatory mishandling of Negro registration applications.

(5) The names of white people allowed to register who possessed no better qualifications than such Negroes denied the same privilege.

(6) The facts and circumstances in necessary detail showing such discrimination in each of said instances and respects so as to reveal with fair and reasonable particularity the factual background for all of plaintiff's conclusions in the eighth paragraph[3] of the complaint.

On October 10, 1961, in compliance with this order, the government filed an amended complaint, naming 63 Negroes and detailing the circumstances of their attempts to register and their rejection by petitioner Lynd. No white persons who had been given preferential treatment were listed in the amended complaint because—due to the refusal of the court to grant discovery of the Forrest County registration records—the government had no information at that time concerning specific white applications. On January 26, 1962, the court granted defense motions to strike from the amended complaint all incidents of discrimination antedating February 26, 1959, the date Lynd took office and ordered the complaint amended a second time.

The motion for a preliminary injunction was heard on March 5–7, 1962. The government introduced the testimony of Negro witnesses showing a number of acts of racial discrimination, and then attempted to

[3] That paragraph alleged with specificity that defendants had engaged in discriminatory acts and practices in the registration process.

bring in evidence of preferential treatment given to white applicants for registration. The court refused to allow any testimony concerning the processing of applications by white persons on the ground that this evidence had not been specifically pleaded in the complaint. In view of this ruling, the government once more amended its complaint to plead further evidentiary details. It was then permitted to show that white applicants had received preferential treatment. The defendants offered no proof although they were given an opportunity to do so. Nevertheless, upon request for a ruling, the court refused to grant or deny the motion for preliminary injunction. Instead, it granted the defendants (1) thirty days in which to answer the complaint as amended at the hearing, and (2) the right to reserve cross-examination of witnesses who were not specifically mentioned in the complaint prior to the last amendment. The court indicated that it would resume the hearing fifteen days after the defendants' answer was filed. The government's motion to vacate the order extending the time for answering, to require defendants' answers within five days, and to set the case for trial on the merits were denied on March 29, 1962.

Meanwhile on March 21, 1962, the government appealed the district court's refusal to grant a preliminary injunction. On April 10, 1962, the court of appeals granted the government's motion for an injunction pending appeal. *United States* v. *Lynd*, 301 F. 2d 818 (C.A. 5).* A petition for rehearing on the

* Thereafter, a show-cause order was issued by the court of appeals as to why petitioner Lynd should not be held in con-

injunction pending appeal was denied on May 21, 1962.

ARGUMENT

1. *a.* The court of appeals, after hearing arguments of both parties, correctly held that "the failure of the trial judge to grant the temporary injunction constituted an 'interlocutory order of the district court, * * * refusing * * * an injunction.' Such order is appealable" (Pet. App. A, p. 9). See 28 U.S.C. 1292(a). A preliminary injunction runs only until the district court decides the merits of the case in giving or refusing a permanent injunction. The district court, in effect, held that it would not issue an injunction unless and until procedures normally associated with requests for permanent injunction were had.[5] More than eight months had already been consumed. The ruling deprived the government of the right to a preliminary injunction, and thus was the equivalent of a denial of such an injunction. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541; *Ettelson* v. *Metropolitan Life Insurance Company*, 317 U.S. 188; *United States* v. *Wood*, 295 F. 2d 772 (C.A. 5), certiorari denied, 369 U.S. 850 (the district court's refusal to issue a temporary restraining order enjoining use of state criminal process to in-

---

tempt for violation of this injunction. A contempt trial is to be held shortly. The government's brief on appeal from the district court's refusal to grant the preliminary injunction was filed on August 3, 1962. Appellees' brief was filed September 17.

[5] Thus, the district judge stated: "when you grant the injunction you have decided the case * * *. I am going to hear this whole thing through * * * and I am going to finish it before I make a decision" (Official transcript of district court record, 1195–1196).

timidate Negro voters held to be appealable even though only a temporary restraining order was involved).

Petitioners cite *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176 (Pet. 9–10), in which this Court said that an order refusing to stay a trial to permit special arbitration proceedings did not constitute a refusal to grant an injunction and hence did not authorize an interlocutory appeal. But that decision is not relevant here. The district court in the instant case refused to issue a preliminary injunction at the appropriate point in the proceedings and thus effectively denied the government's claim for preliminary relief.

b. Petitioners assert (Pet. 13–18) that there was no official transcript before the appellate court and therefore no facts or proceedings for the court to review. However, Rule 75(j) of the Federal Rules of Civil Procedure explicitly provides that a party asking for intermediate relief before the complete record is certified may base this claim on the portion of the record which is necessary for the purpose.[6] The rea-

[6] Rule 75(j) provides that:

"If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose."

Cases cited by petitioners in support of their contention, *In re Chapman Coal Co.*, 196 F. 2d 779 (C.A. 7); *Springer* v. *Best*, 264 F. 2d 24 (C.A. 9), refer to appeals on the merits. These cases of course did not come within Rule 75(j) since no claim for intermediate relief was involved.

son for the rule is that intermediate relief often requires prompt action by the appellate court.

In accordance with this provision the original papers of the district court were submitted to the court of appeals prior to the April 6 hearing in that court. Admittedly the transcript before the court of appeals at the time of the hearing on the government's motion for injunction pending appeal was "unofficial." It was, however, prepared by court reporters engaged by government attorneys in order to have a daily transcript of proceedings,[7] and was the only transcript available at the April 6 hearing. The official court reporter's notes were not transcribed even as late as April 27, 1962. The certified copy of the official transcript of the district court proceedings is now before the court of appeals, and appellees (petitioners here) will be unable to point out any harmful variances between the two transcripts.[8]

2. The court of appeals clearly did not abuse its discretion in issuing the injunction pending appeal. The government introduced evidence in the trial court showing systematic discrimination against Negroes (see opinion of the court of appeals, Pet. App. A, pp. 5–7). As the court below pointed out, "a temporary injunction * * * is a part of the trial court, or in

[7] The court had ruled that the official court reporter would not be allowed to furnish the government attorneys with a daily transcript of the proceedings.

[8] Although petitioners allege that there are errors and inaccuracies in the unofficial transcript (Pet. 15), they fail to point out any specific examples bearing out these allegations. In our comparison of the two versions, we have found only minor variances, and none which could possibly be considered harmful to petitioners. Copies of both transcripts are lodged with this Court.

this instance, of an appellate court, issued to protect the rights of any person moving for it upon his making a showing that he is entitled to it. The grant of a temporary injunction need not await any procedural steps perfecting the pleadings or any other formality attendant upon a full-blown trial of this case" (Pet. App. A, p. 9). Thus the court of appeals was clearly justified in granting the injunction until its determination on the merits of the preliminary injunction.*

3. The government's appeal in the case is presently pending on the merits in the court of appeals. That court thus far has merely granted an injunction pending appeal. To entertain a petition for certiorari at this stage of the proceedings would needlessly consume the time of this tribunal. "The exceptional power to review, upon certiorari, a decision of a Circuit Court of Appeals rendered on an appeal from an interlocutory order is intended to be and is sparingly exercised." *Denver* v. *New York Trust Co.*, 229 U.S. 123, 133. The normal procedure is to issue the writ only after a final decision of the court of appeals when the entire record is before the Court for review and any intermediate errors can be corrected. See also *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, 383; *Panama Railroad Co.* v. *Napier Shipping Co.*, 166 U.S. 280; Robertson and Kirkham,

* Petitioners' contention (Pet. 20–21) that there is no case or controversy between the United States and the State of Mississippi is frivolous. The government contends that the State, through one of its officials (registrar of voters Lynd, who is also a defendant), has denied Negroes their constitutional right to vote. This certainly constitutes a real controversy between the two parties.

Jurisdiction of the Supreme Court of the United States, pp. 231–234 (1951 ed.). Thus, it would be unusual for this Court to review even a decision of the court of appeals on the merits as to whether a preliminary injunction should issue. *A fortiori*, this Court should review interlocutory relief rendered by the court of appeals pending determination as to the preliminary injunction only in the most compelling circumstances. There are no such circumstances in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
BURKE MARSHALL,
Assistant Attorney General.
HAROLD H. GREENE,
ISABEL L. BLAIR,
Attorneys.

SEPTEMBER 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962